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No. 90-798

Supreme Court, U.S.
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In the Supreme Court of the United States

OCTOBER TERM, 1990

JOHN A. THOMPSON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF MILITARY APPEALS

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's Sixth Amendment right to confront the witnesses against him was violated when the trial judge permitted the child victims to testify while seated facing away from petitioner, after the judge found that the victims would suffer emotional trauma if required to testify facing petitioner.

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OPINIONS BELOW

The opinion of the Court of Military Appeals (Pet. App. 1b-15b) is reported at 31 M.J. 168. The opinion of the Air Force Court of Military Review (Pet. App. 1a-17a) is reported at 29 M.J. 541.

JURISDICTION

The judgment of the Court of Military Appeals was entered on September 25, 1990. The petition for a writ of certiorari was filed on November 20, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. 1259(3).

STATEMENT

Following a general court-martial at Kirtland Air Force Base in New Mexico, petitioner, a member of the United

States Air Force, was convicted of assaulting his wife, in violation of Article 128 of the Uniform Code of Military Justice (UCMJ), 10 U.S.C. 928, and sodomizing his two minor stepsons, in violation of Article 125, 10 U.S.C. 925. Petitioner was sentenced to confinement for 30 years, a dishonorable discharge, forfeiture of all pay and allowances, and a reduction in rank. The convening authority approved the findings and sentence. The Air Force Court of Military Review affirmed the findings and sentence. On discretionary review, the Court of Military Appeals affirmed.

1. The evidence at trial showed that petitioner had repeatedly anally and orally sodomized his two stepsons in 1984 and 1985 when one was ten years old and the other was seven years old. Pet. App. 2b. Prior to trial, the prosecution informed petitioner that they were going to request that the boys be seated facing away from petitioner when they testified. Tr. 68. Petitioner's counsel objected to the proposed seating arrangement. *Ibid.*

At the time of trial, in February 1988, both of the boys were undergoing treatment for psychological and emotional trauma resulting from the incidents with petitioner. Pet. App. 2b-3b. They saw Linda Sweeney-Frawley, a psychologist, on a bi-weekly basis beginning in June 1987 and continuing up to the time of trial. Tr. 76-77. The boys had been referred to Ms. Sweeney-Frawley solely for treatment. Tr. 76.

The prosecution responded to petitioner's objection by calling Ms. Sweeney-Frawley to explain why it was necessary to seat the boys in the fashion that the prosecutor had proposed. Tr. 70-71. The prosecutor asked Ms. Sweeney-Frawely if she had an opinion as to whether the boys would be able to sit in the witness box and describe what had happened to them. Tr. 77. She responded that "that would present a problem for the children who have a great deal of anxiety and fear about participation" in the trial pro-

ceedings. Tr. 77-78; Pet. App. 3b-4b. She explained that the boys continued to have "a great deal of anxiety and shame and fear" regarding the events about which they were to testify, and that it would "impair their ability to talk about their experiences and to actively think about the questions" if they were required to testify in petitioner's direct line of vision. She added that the boys had spoken to her recently about their fear of being in the courtroom with petitioner and even expressed fear that they might be attacked by him in the courtroom. Tr. 77-78; Pet. App. 3b-4b.

When asked what impact facing the boys away from petitioner would have on their ability to testify, Ms. Sweeney-Frawley responded, "I think that that would lessen their anxiety and would be less likely to produce blocks in their intellectual capacity to respond to questions if they do not have [petitioner] in their direct line of vision." Tr. 78; Pet. App. 4b. Ms. Sweeney-Frawley testified that the boys' responses to discussing the incidents varied: the younger one tended to become withdrawn, while the older one tended to become more obviously anxious and had difficulty focusing his attention and sitting still. Tr. 81. Although she did not believe that the boys would "adamantly refuse" to testify if they had to face petitioner, Tr. 82, Ms. Sweeney-Frawley did believe that such a requirement would impair their ability to recall the events and testify about them, *ibid.* She stated that the older boy

> has a stuttering problem that increases when he is anxious and anxiety is such an overwhelmingly strong emotion that it blocks intellectual function, so that if you raise the anxiety level of someone, it's normal for intellectual, the ability to intellectually think about something, to be shut off. And I think that their ability

> to respond to questions with their full recollection would be impaired by that situation.

Tr. 82; Pet. App. 8a. She also explained that her opinion was based in part on petitioner's status as the boys' stepfather. Tr. 82; Pet. App. 8a.

The trial judge overruled petitioner's objection to the proposed seating arrangement. He stated, Tr. 87-88; Pet. App. 4b-5b:

> Trial counsel has presented evidence through Linda Ann Sweeney-Frawley that the children if required to testify from the witness stand where they would be looking directly at the accused would have their ability to think and testify accurately impaired and that they could respond better if the accused were not in their direct line of sight, and I find by a preponderance of the evidence that that's a fact.
>
> I further find that:
>
> One, such a[n] arrangement will not have any effect on the Court with regard to the presumption of innocence of the accused[1];
>
> Two, that the arrangement proposed by trial counsel is in no way obtrusive and certainly not comparable with the arrangements in *Coy* v. *Iowa* [487 U.S. 1012 (1988)] cited by defense counsel;
>
> Three, the accused and witnesses will be in the same room with no barrier between them and the fact that the witnesses will not be facing the accused will not deprive the accused of his right to confrontation;

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[1] Petitioner waived his right to a trial by a court-martial panel and requested a bench trial before the military judge alone, to which he was entitled under Article 16(1)(b) of the UCMJ, 10 U.S.C. 816(1)(B). Tr. 10.

> Four, considering the testimony concerning the trauma to the children if forced to testify facing the accused, and balancing that factor against the accused's alleged right to have witnesses facing him, I find the procedure proposed by the trial counsel will not prejudice the rights of the accused and will insure the witnesses testify freely.
>
> The objection is therefore overruled.[2]

2. The en banc Air Force Court of Military Review affirmed. Pet. App. 1a-11a. The court reasoned that the information before the trial judge demonstrated that the boys feared being physically assaulted by petitioner, and that, because of that fear, the boys "were likely to be so confounded by facing [petitioner] directly that their mental capabilities might be blocked, rendering them incapable of testifying" or likely to lie in order to dispell the stress of the event. *Id.* at 10a. Under the facts of this case, the court found that, since petitioner was present in the courtroom and could observe everything but the witnesses' facial expressions and since defense counsel and the trial judge, as trier of fact, could observe the witnesses' demeanor and facial expressions, the courtroom seating arangement did not violate petitioner's rights under the Confrontation Clause. *Id.* at 10a-11a.

3. The Court of Military Appeals also affirmed. Pet. App. 1b-12b. Judge Cox concluded that, under *Maryland* v. *Craig*, 110 S. Ct. 3157 (1990), the courtroom seating arrangement did not violate the Confrontation Clause. Pet. App. 8b-12b. In so ruling, Judge Cox relied on four factors that, in his view, safeguarded the reliability of the

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[2] A rough diagram of the courtroom is attached to the record as DX C. The letter "W" depicts where the boys would be seated during their testimony. The room was described as being about 50 to 60 feet in length, and about 15 feet in width. Tr. 83.

witnesses' testimony. First, the record showed that the boys understood the solemnity of their oath to testify truthfully. Second, petitioner was given every opportunity rigorously to cross-examine the boys about their testimony. Third, the trial judge, as the fact-finder in a bench trial, was able to observe the boys' demeanor and to assess their credibility. Fourth, the trial judge and the court of military review specifically found that the procedure used here to protect the boys was necessary. *Id.* at 10b-11b.

Judge Everett concurred. Pet. App. 12b-14b. He concluded that the trial judge's factual findings were sufficient under *Maryland* v. *Craig* to justify the procedure used here. *Id.* at 14b. Judge Sullivan concurred in the judgment. Pet. App. 15b. He, too, concluded that the trial judge's factual findings were sufficient under *Maryland* v. *Craig* to justify the seating arrangement. *Ibid.* He also determined that any error was harmless given the testimony of the psychologist, who reiterated the boys' out-of-court account of petitioner's assaults. *Ibid.*

ARGUMENT

Petitioner contends that the courtroom seating arrangement violated the Confrontation Clause of the Sixth Amendment because he could not see the facial expressions of the two child witnesses while they testified. That claim does not warrant review by this Court.

In *Coy* v. *Iowa*, 487 U.S. 1012 (1988), this Court held that the Confrontation Clause generally guarantees the defendant the right to confront witnesses face-to-face. 487 U.S. at 1016. The Court also held that the use of a screen preventing two child witnesses from seeing the accused as they testified against him at trial violated the Confrontation Clause. *Id.* at 1016-1021. The Court left open, however, whether such a procedure would be permissible if the trial

judge made individualized findings that a particular child witness needed special protection against having to face the defendant while testifying. *Id.* at 1021. In a concurring opinion, Justices O'Connor and White concluded that a trial procedure that denied a defendant the right to confront witnesses face-to-face would not violate the Confrontation Clause if the trial court made a "case-specific finding" that denying confrontation was necessary "to further an important public policy," such as protecting child witnesses against the trauma of testifying under such circumstances. *Id.* at 1025.

The Court addressed that issue last Term in *Maryland* v. *Craig*. *Craig* involved the use of a one-way television camera in order to present the testimony of a child witness who was the alleged victim of sexual abuse by the accused. The Court held that the Confrontation Clause does not in every case forbid denying the defendant the right to a face-to-face confrontation of a child witness who testifies against him. 110 S. Ct. at 3162-3166. The defendant's right to confront a witness face-to-face may be denied when doing so is "necessary to further an important public policy" and "where the reliability of the testimony is otherwise assured." *Id.* at 3166.

To establish the necessity for such a procedure, the trial court must find that the chosen procedure is "necessary" to protect the welfare of the particular child witness, that the witness would be "traumatized" by the presence of the accused, not by the courtroom generally, and that the emotional distress suffered by the child in the presence of the defendant is "more than *de minimis*, *i.e.*, more than 'mere nervousness or excitement or some reluctance to testify.'" 110 S. Ct. at 3169 (citation omitted). The Maryland procedure, the Court found, "ensures the accuracy of the testimony and preserves the adversary nature of the trial," *ibid.*, because it "preserves all of the other elements of the

confrontation right: the child witness must be competent to testify and must testify under oath; the defendant retains full opportunity for contemporaneous cross-examination; and the judge, jury, and defendant are able to view (albeit by video monitor) the demeanor (and body) of the witness as he or she testifies," *id.* at 3166. As the Court explained, the Confrontation Clause does not forbid denying a defendant a face-to-face confrontation "where necessary to protect a child witness from trauma that would be caused by testifying in the physical presence of the defendant, at least where such trauma would impair the child's ability to communicate," if the procedure "ensures the reliability of the evidence by subjecting it to rigorous adversarial testing," thereby preserving "the essence of effective confrontation." *Id.* at 3170.

The decisions below are consistent with *Coy* and *Craig*. The trial judge had before him uncontroverted evidence indicating that the boys would be emotionally traumatized and that they would not be able to "talk about their experiences" and think about the questions if they were forced to face petitioner while they testified. Tr. 77-78, 82; Pet. App. 4b-5b. Relying on that evidence, the trial judge found that the boys' ability to "think and testify accurately" would be impaired if they were required to face petitioner. *Id.* at 8a. Although the trial judge never used the word "necessity" in his findings, *id.* at 4b-5b, a finding of necessity is implicit in the court's findings. Moreover, the procedures used were sufficient to ensure that the boys' testimony was reliable. The boys testified under oath in petitioner's presence. The boys were 10 and 12 years old at the time of trial and thus were able to understand the significance of their oath to testify truthfully. And although petitioner could not see the boys' faces, they testified in the full view of defense counsel and the trial judge, who was the trier of fact in this bench trial.

The court of military review, exercising its independent fact-finding authority, see Art. 66(c), UCMJ, 10 U.S.C. 866(c), found that the seating arrangement was necessary in order to protect the welfare of the boys. The court also concluded that the boys' emotional distress at facing petitioner was not simply nervousness caused by the courtroom setting, but was a fear of being physically assaulted. *Id.* at 10a.[3] After discussing the evidence developed at trial on the question of necessity, the court found that the trial judge's inquiry satisfied the standard set forth in Justice O'Connor's concurring opinion in *Coy* and justified "the particular steps taken to accommodate the fears of the child witnesses in this case." *Id.* at 9a. The court added, however, that it was not adopting a per se rule approving the use of the same procedures in every case. In fact, the court recognized that the presumption is that such procedures should not be used. *Ibid.*[4] In addition, the Court of Military Appeals concluded

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[3] As that court explained, Pet. App. 10a:

> Many witnesses may harbor a fear of being attacked for their adverse testimony, but these children had already been repeatedly beaten by [petitioner] during his commission of the offenses for which he was being tried. Their fear was based on their actual knowledge of the physical harm he was capable of inflicting.

[4] As the court explained, *ibid.*:

> We are not indicating our advance approval of every situation in which witnesses testify with their backs to the accused, even where there is an inquiry into the necessity for such a procedure. *Coy* holds that the general rule is to the contrary. When exceptions are found, the [trial] judge will, undoubtedly, have conducted a careful inquiry into the reasons for the proposed seating arrangement. That inquiry will have satisfied the judge that there are compelling reasons for changing the traditional witness seating arrangement. A thorough inquiry would probably include an *in camera* interview by the judge with the witnesses who might need the special arrangement. This procedure would allow the judge to evaluate the testimony of any experts who have testified about the need for protections.

that the trial judge's findings were adequate to satisfy the requirements set forth in *Craig*. *Id.* at 10b-12b, 14b (Everett, C.J., concurring), 15b (Sullivan, J., concurring in the result).

Petitioner argues that the trial judge should have required the children to testify facing petitioner, rather than relying on the testimony of the psychologist who had been treating them for more than two years, before approving the seating arrangement. Pet. 5-6. But this Court rejected a similar claim in *Craig*. The Court ruled that a trial judge need not always question the child witness in the defendant's presence in order to determine what effect confronting the defendant would have on the child. Instead, the trial judge may rely on expert testimony about the effect that testifying in the defendant's presence would have on the child. 110 S. Ct. at 3170-3171. That ruling is equally applicable here.

Petitioner also maintains that the seating arrangement deprived him of his ability to communicate with his counsel while the boys testified. Pet. 7. That claim lacks merit. The trial court took steps to protect petitioner's right to cross-examine the two boys and to assure that petitioner could consult with counsel during the proceedings. The court held a recess between the direct and cross-examination of the younger boy, Tr. 146, and took another recess during the cross-examination, Tr. 159. Petitioner was given the opportunity for re-cross-examination of the younger boy, which his counsel declined, Tr. 171, although petitioner reserved the right to recall him as a witness later in the proceedings, Tr. 168. The court held another recess before the defense cross-examination of the older boy. Tr. 187. Petitioner was given, but declined, the opportunity for re-cross-examination. Tr. 211. He also placed the older boy on recall, Tr. 211, but never called him back to the stand. Petitioner does not claim that the trial judge denied defense counsel the opportunity to interrupt his cross-examination in order

to consult with petitioner. In fact, the defense never asked for such an interruption. See Tr. 147-168, 188-206. Petitioner also has not identified any way in which he was prejudiced by the seating arrangement. Under these circumstances, the trial seating arrangement did not deny petitioner the opportunity to consult with his counsel.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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